SUPREME COURT, U. S.

FILED

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 431

BOSS HOTELS COMPANY,
Petitioner,

vs.

CITY OF DES MOINES, IOWA, CHARLES ILES, GEORGE WHITMER, JENS GROTHE, WALLACE BUSS, GEORGE NAHAS, Members of the City Council of the City of Des Moines, Iowa, RIVER HILLS MOTOR INN COMPANY, F. W. WEITZ and NATIONAL MOTOR INN CORP.,
Respondents.

## PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Iowa.

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Respondents.

## PETITION FOR WRIT OF CERTIORARI

**To the Supreme Court of Iowa.**

Petitioner, Boss Hotels Company, an Iowa corporation engaged in the hotel business, seeks a review by this Court of the decision and judgment of the Supreme Court of the State of Iowa; and as grounds therefor states:

(a) The opinion of the court below is unofficially reported as Boss Hotels Company v. City of Des Moines, Iowa, et al., 141 N. W. 2d 541; Advance sheet # 4, not yet published in the Official Iowa Reports. Timely petition for

rehearing was denied by the Iowa Supreme Court on May 11, 1966.

(b) The judgment sought to be reviewed is dated April 5, 1966, and was entered on such date. The Iowa Supreme Court denied petition for rehearing on May 11, 1966, and the judgment then became final. No application for extension of time for filing this petition has been made. The jurisdiction of the court is based upon the act of June 25, 1948, chapter 646, § 1, 62 Stat. 927, effective September 1, 1948, and Rule 19 of the court.

(c) Boss Hotels Company brought an action in equity praying for an injunction enjoining the City of Des Moines and members of the City Council, River Hills Motor Inn Company, Weitz and National Motor Inn Corp. from entering into or perform any contracts for the sale of Urban Renewal parcels T-1 and T-3. The Urban Renewal Plan which had been duly adopted by the City incorporated the provisions of the Des Moines Zoning Ordinance, and such ordinance restricted the erection of structures on parcels T-1 and T-3 to three stories. Under the Federal statute known as the Housing Act of 1949 as Amended, the City had contracted with the Federal Government to sell Urban Renewal property only to persons who would use it in accordance with the Urban Renewal Plan. Also the Iowa statute implementing Urban Renewal required that the City require purchasers of Urban Renewal land to devote the land to the uses specified in the Urban Renewal Plan. The City offered parcels T-1 and T-3 for sale. Under competitive bidding Boss Hotels made an offer to purchase parcel T-3 and the evidence shows it was interested in making an offer on parcel T-1. The City proposed to sell parcel T-3 to River Hills Motor Inn Company and to sell parcel T-1 to National Motor Inn Corp. despite the fact that each proposed to erect structures of five stories or more in height. The question presented for review is

whether the Iowa Court should have granted the injunction in the light of the circumstances that the Iowa Urban Renewal statute required the property sold to be devoted to the uses specified in the Urban Renewal Plan, that the City had contracted with the United States to sell such property only for uses only in accordance with the Urban Renewal Plan, that the bulk of the entire Urban Renewal program was financed with Federal funds, and that Boss proposed to erect a motor hotel partly of 2 stories and partly of 3 stories on parcel T-3.

(d) The statutes, ordinances and regulations which the case involves are as follows:

1. Section 1 of chapter 14-1 of the Urban Renewal Manual (Regulations) issued by the Home and Financing Administration provided in part as follows:

"Realization of the redevelopment contemplated by the Urban Renewal Plan is the principal objective of the LPA-S LPA Land Disposal Activity."

2. Section 403.8 Code of Iowa 1962 provides:

"A municipality may sell . . . real property . . . in an urban renewal area for . . . commercial . . . or other uses . . . The purchasers . . . shall be obligated to devote such real property only to the uses specified in the Urban Renewal Plan . . ."

3. Section 2A-24 of the Des Moines Zoning Ordinance provided as follows:

"Height regulations. No building shall exceed three (3) stories or forty-five (45) feet in height . . ."

(e)-(f). A statement of the case is as follows: Plaintiff, Boss Hotels Company, hereafter called "Boss", is an Iowa corporation and a taxpayer, of Des Moines, Iowa. The Defendants are the City of Des Moines, the members of its City Council, hereafter called "City", River Hills

Motor Inn Company and F. W. Weitz, hereafter called "Sheraton", and National Motor Inn Corp., hereafter called "National Motor Inn".

Boss prayed for an injunction restraining the City and Sheraton from entering into or performing a contract for the sale and purchase of parcel T-3 in River Hills Urban Renewal area, and also sought a permanent injunction restraining the City and National Motor Inn from entering into or performing a contract for the sale and purchase of parcel T-1.

Reference will be made to the Urban Renewal Board of the City. Such Board is a statutory agency with authority to act in an advisory capacity to the City Council in reference to urban renewal matters. Mention will also be made of the Housing and Home Finance Agency; such agency is a Federal authority created by the Housing Act of 1949 as amended. The Federal Urban Renewal Administration is a branch of the Housing and Home Finance Agency. The Urban Renewal Administration for the Des Moines area is conducted in Region 4 thereof at Chicago. The Urban Renewal Manual (Rec. 139; 42) is a federal manual having the force and effect of law in governing the administration of Urban Renewal in the Federal area. Mention will also be made of a Kansas corporation, Inn Operations, Inc., and will be hereafter referred to as "Holiday".

In October of 1955 an ordinance was passed by the City Council of Des Moines appointing a Redevelopment and Housing Administrator. In 1957 the City Council selected "River Hills" (called in Federal terminology Iowa R-1), as the first urban renewal project in Des Moines. In December of 1957, a public hearing was held after which River Hills was officially declared an urban renewal project by the City Council. In February of 1959 a "workable" program was completed by the City's Department

of Redevelopment and Housing and submitted to the Housing and Home Finance Agency, which agency in May of 1959 wired certification and acceptance of the "workable" program. On November 30, 1961, the Urban Renewal Administration approved an amended River Hills Plan.

The River Hills Urban Renewal area is generally bounded by East Sixth Street on the East, University Avenue on the North, Sixth Avenue on the West and Grand and Crocker Streets on the South. Parcels T-1 and T-3 are located on the South side of the freeway as shown in the Plat (R. 208). Parcel T-1 contains 121,725 square feet and Parcel T-3 contains 127,928 square feet.

The City and the Federal government entered into a Loan and Grant Agreement following adoption and approval of the original Urban Renewal Plan. Among other matters such agreement obligated the Federal government to loan the City several millions of dollars to enable the City to have funds with which to acquire the land in the River Hills Urban Renewal area, and further provided that after acquisition, razing and sale of the properties in the area, the ultimate net cost of the project would be borne two-thirds by the Federal government and one-third by the City.

The Loan and Grant Agreement (R. 134) obligated the City to carry out the project in accordance with the Urban Renewal Plan. In the contract the City further agreed to refrain from selling any Urban Renewal land "except in accordance with and in order to carry out the Urban Renewal Plan." The City also agreed that any land sold would be made available "at not less than its fair value for use in accordance with the Urban Renewal Plan." In the contract the City further agreed that it would obligate the purchasers of Urban Renewal land "to devote such project land to the uses specified in the Urban Renewal Plan."

The City proceeded to purchase and raze the land in the Urban Renewal area and caused Parcels T-1 and T-3 to be platted as such. The City then proposed to sell such parcels to redevelopers such as Plaintiff, Sheraton, National Motor Inn and Holiday. At Record page 209 is the Urban Renewal Plan effective as of the time when the proposal or bids of Plaintiff, Sheraton, National Motor Inn and Holiday were filed and submitted to the City through the Urban Renewal Board. On the frontis page of Ex. 4 it is indicated that the Urban Renewal Plan was adopted October 1, 1959 and revised July 1, 1961 and November 1, 1962; such dates are the dates when the City Council approved the original plan for the revisions; it was agreed that the original plan and all amendments were later approved by HHFA.

The Urban Renewal Plan contains on page one thereof a table of contents which shows that Section A of the Plan is the table of contents, Section B is a description of the project. Section C is Land Use Plan and Section D is project proposals. Section E contains other provisions necessary to meet state and local requirements. Section F relates to changes in the approved plan and Section G is the Appendix, being two maps. It is to be observed that under Section C, being "Land Use Plan", appears all matters relating to the use of the land by redevelopers.

Such Section C of the Urban Renewal Plan more specifically, provides that the use of Parcels T-1 and T-3 shall be for motor hotel and certain limited retail purposes if accessory to motor hotel use. Subsection (a) thereof requires that there be a minimum lot area of 750 square feet per unit, off-street parking of one space per unit and a maximum floor area ratio of .5. A floor area ratio of .5 means that the total building floor area may not exceed one-half of the total lot area. Subparagraph 3 provides that zoning districts are as shown on attached maps and further provided that "Whenever these regulations and

controls are at variance with the provisions of the Des Moines zoning ordinance, the more restrictive regulations shall take precedence." Parcels T-1 and T-3 were zoned C-2 according to the attached map. The zoning ordinance at Section 2A-24 thereof entitled "Height Regulations" under C-2 provides "no building shall exceed three stories or 45 feet in height . . ."

Petitioner's case is bottomed on the proposition that under the Urban Renewal Plan, no structure on Parcels T-1 and T-3 could exceed three stories or 45 feet in height, and that the City was legally incapable of accepting bids which contemplated structures in excess of the limitation.

In its Petition, the Plaintiff alleged that under the Urban Renewal Plan, in effect at the time of the invitation of the City for bids and the filing of bids, provided for structures upon the premises of not to exceed three stories or 45 feet in height. Plaintiff further alleged that it and Sheraton filed proposals to purchase T-3 and that National Motor Inn Corp. filed a proposal to purchase T-1, and that Boss was interested in purchasing T-1. The Petition further alleged that the proposals of Sheraton and National Motor Inn provided for structures in excess of those permitted by the Urban Renewal Plan in that Sheraton proposed an eight-story motor hotel and National Motor Inn proposed a five-story hotel. Plaintiff alleged that any action of such Defendants to purchase said parcels upon the basis of their proposals and any action on the part of the City to sell on such basis violated the Urban Renewal plan, and that any contracts for the performance thereof arising out of said proposals and acceptances be illegal, inequitable, improper and void: wherefore Plaintiff prayed for the injunction (R. 3).

At the trial it developed that the various proposals were made in response to an invitation for bids contained in the City's Land Disposition Documents Packet (R. 271).

The Urban Renewal Board fixed the cutoff date for receiving proposals at November 2, 1964 at 9:00 o'clock A. M. On November 2, 1964 prior to 9 A. M., Boss filed its proposal and Sheraton filed its proposal. Holiday had earlier filed a proposal to purchase Parcel T-3 and National Motor Inn had earlier filed a proposal to purchase Parcel T-1.

The Urban Renewal Board considered the various proposals at its meeting November 10, 1964 and voted to recommend to the Council acceptance of the proposals of National Motor Inn to purchase T-1 and the proposal of Sheraton to purchase T-3. On November 16, the City Council adopted Roll Calls accepting the bids of Sheraton and National Motor Inn.

Briefly stated, Boss offered to pay $240,000 in cash and erect a motor hotel varying in height from two stories to six stories. Sheraton offered to pay $236,396.70 and proposed to erect a motor hotel eight stories in height. Holiday offered to pay slightly less than $240,000 cash and proposed a three-story structure; price later increased. National Motor Inn offered to pay the minimum cash price for Parcel T-1 and erect a five-story motel.

On November 16, 1964, **and after the cut-off date for receiving bids**, the City Council amended paragraph C (3) (b) of the Urban Renewal plan by substituting in lieu thereof the following:

> "Recommended zoning districts were established as most closely approaching the regulations and controls for the area. Height regulations and restrictions found in the Des Moines Zoning Ordinance shall not apply to improvements constructed of which may be constructed on disposition Parcels T-1 and T-3. In other matters wherever these regulations and controls are at variance with the provisions of the Des

Moines Zoning Ordinance, the more restrictive regulation shall take precedence" (R. 318).

It is thus apparent that the Urban Renewal plan was not amended so as to permit structures in excess of three stories to be erected until **after** the Council and the Urban Renewal Board received the bids of Boss, Sheraton, National Motor Inn and Holiday.

On March 15, 1965, the City Council by Roll Call 850 purported to formalize the modifying of the Urban Renewal plan in the respect above stated and further eliminated the requirement that the more restrictive provisions of the Des Moines Zoning Ordinance should take precedence over uses and restrictions contained in the Urban Renewal plan. Later the City Council approved as satisfactory proposed formal contracts between the City and Sheraton and the City and National Motor Inn.

At the trial Jack Drey, a Boss architect, testified that he visited the Urban Renewal office prior to the preparation of the Boss bid and was told by someone there to not be concerned about the height and floor area ratio matters. He reported this to Mr. Edwin A. Boss, the President and Chief Executive officer of the Petitioner. Paul Lefton, on behalf of Boss, then visited the Urban Renewal office, was given the Land Disposition Documents and was told he need not worry about the three-story limitation on height inasmuch as the Board of Adjustment would probably grant a variance. James Dougher, a member of the architectural firm of Dougher, Frevert, Ramsey, Architects and Engineers, testified that a change from low-rise to high-rise would enable the developer to effect a savings in unit cost of approximately $400.00 per unit. Mr. E. A. Boss testified that if he could have proposed a high-rise development of eight or ten stories he would have offered $15,000 more for the land. Mr. Boss further testified that Parcel T-1 was only suitable for a

high-rise structure and that he would have submitted a bid for the parcel if there were no height restrictions.

Don Swanson, an attorney and a member of the Urban Renewal Board, testified on behalf of the Plaintiff that the Urban Renewal Board expected bids or proposals to be submitted in the light of the Urban Renewal plan. Mr. Max Krumery, Chief Staff Officer of the Urban Renewal Board, admitted that the Urban Renewal plan was the guideline for bidding.

On May 24, 1965, the Trial Court filed its Findings of Fact and Conclusions of Law, Summary and Direction. The Trial Court without giving reasons therefor simply stated that the Plaintiff had failed to make a case and that the City had provided reasonably competitive bidding procedures. In connection with various affirmative defenses of the Defendants, the Trial Court simply stated that the Plaintiff lacked standing to sue. On May 27, 1965, a Decree was entered dismissing the Petition.

At the trial Boss Hotels introduced in evidence the Loan and Grant Agreement between the City and the United States. Section 106 of such contract provided that the City will "not sell, mortgage, lease or otherwise dispose of or encumber any of the project land which is held by it as a part of the project, except in accordance with and in order to carry out the Urban Renewal plan." And subsection H of said section 106 further provided:

> "When project land is sold or leased by the local public agency it will obligate the purchasers or lessees as the case may be and the assignee of such purchasers or lessees (1) to devote such project land to the uses specified in the Urban Renewal plan . . .".

Boss also introduced in evidence the Urban Renewal Manual.

Paragraph 8 of Boss Hotel's Petition filed in the Polk County, Iowa District Court, alleged:

"The proposals of the said Defendant Developers do not meet the requirements of the said Urban Renewal plan in that, among other matters, said Defendants proposed to erect motels in excess of three stories or forty-five feet in height upon said parcels, in violation of section 403.8, Code of Iowa, 1962."

In the opinion of your petitioner such allegation raised the question as to whether the proposed sales met the Federal requirement of adherence to the Urban Renewal plan.

On May 24, 1965 the Trial Court filed its Findings of Fact and Conclusions of Law. In the findings the Court said that under the Urban Renewal plan hotels exceeding three stories or forty-five feet in height could not be legally erected on either parcel T-1 or T-3. In its conclusions of law, the Trial Court simply held "that the Plaintiff has not established" its claim that the proposals of the developers did not meet the requirements of the Urban Renewal plan, and the Court further held as a conclusion that the Plaintiff had not established its allegation that the City had failed to comply with the above quoted section 403.8 of the Code of Iowa. In its Decree of May 27, 1965, the Court incorporated its Findings of Fact and Conclusions of Law and then ordered the case be dismissed and costs taxed to the Plaintiff.

In the Iowa Supreme Court the proposition submitted by Boss Hotels was the following:

"Under section 403.8 of the Code of Iowa, 1962 purchasers of Urban Renewal real property 'shall be obligated to devote such real property only to the use specified in the Urban Renewal plan.' Therefore, the bid of Sheraton and National Motor Inn cannot be accepted by the City because such bids propose structures in excess of three stories or forty-five feet in

height—a use not permitted by the Urban Renewal plan."

Inasmuch as the Urban Renewal project was financed with Federal funds and the City was bound by contract with the Federal government to devote Urban Renewal property only to the uses as specified in the Urban Renewal plan, your Petitioner in this matter contends that the Federal question was properly raised in the Iowa Supreme Court even though the basic proposition of the Plaintiff was the assertion that the proposed sales violated the Iowa statute section 403.8.

The Iowa Supreme Court in disposing of the Appellant's proposition above set forth held that the word "uses" as it appears in the Iowa statute did not extend to height regulations, and said:

> . . . "an examination of the Loan and Capital Grant Contract for the Urban Renewal project between the City and the United States, the excerpts from the Urban Renewal Manual, the Urban Renewal plan and the zoning ordinance of Des Moines, as these appear in this record, do not equate a use of the land with restrictions on the height of buildings."

The Supreme Court of Iowa then affirmed the lower court.

(g) Not applicable.

(h) The writ should be allowed because both the Federal regulation, being the above quoted excerpt from the Urban Renewal Manual, and the City's contract with the Federal government required that the property be devoted when sold to uses in accordance with the Urban Renewal Plan. Petitioner contends that the word "uses" includes the height restriction and that hence both the Trial Court and the Iowa Supreme Court failed to give proper recognition to the Federal requirements.

(i)-(j) The opinion and judgment of the Iowa Supreme Court appear in the Appendix. Also, the Appendix contains the pleadings, the Findings, Conclusions, Summary and Direction of the Trial Court and the Decree of the Trial Court.

Wherefore, Petitioner prays that certiorari be granted.

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Attorney for Petitioner.

# APPENDIX.

1. On January 29, 1965, the following Petition was filed in Polk County Iowa District Court.

## PETITION.

Comes the Plaintiff and for cause of action against Defendants states:

1. Plaintiff, Boss Hotels Company, is a corporation organized and existing under the laws of the State of Iowa with principal place of business in Des Moines, Iowa, and is a taxpayer and citizen of Des Moines, Iowa; the Defendant, City of Des Moines, is a municipal corporation existing under the laws of the State of Iowa; the Defendants, Charles Iles, George Whitmer, Jens Grothe, Wallace Buss and George Nahas are members of the City Council of the Defendant City; the Defendant River Hills Motel Inn Company is a partnership; the Defendant F. W. Weitz is a member of said partnership; the Defendant, National Motor Inn Corp., is a corporation authorized to do business in the State of Iowa.

2. Pursuant to the Housing Act of 1949, 63 Stat. 413, as amended, 42 U. S. C. A., Section 1441 et seq., and pursuant to Chapter 403, Code of Iowa, 1962, the Defendant City purported to approve an Urban renewal plan commonly referred to as the River Hills Urban Renewal Plan.

3. Pursuant to such plan the Defendant City acquired property in the River Hills Urban Renewal area, and said Defendant is now in course of selling said property, including parcels T-1 and T-3 located therein.

4. Under such Urban Renewal Plan and the provisions of the zoning ordinance of the City of Des Moines, said

parcels T-1 and T-3 may be sold by the Defendant City to developers for tourist commercial use only, under motel restrictions which require a minimum lot area of 750 square feet per unit, off-street parking of one parking space per unit, a maximum floor area ratio of .5, 15% of land area for landscaping and no sign higher than thirty feet above the curb level, and under retail and service restrictions which require off-street parking equal to the floor area, a maximum floor area ratio of .5, and 15% of land for landscaping. Under said restrictions a motel not exceeding three stories or 45 feet in height could properly or legally be erected on either parcel T-1 or parcel T-3.

5. Plaintiff was at all times interested in purchasing parcel T-1, and Plaintiff did file with the Defendant City a proposal to purchase parcel T-3 for $240,000.00 cash.

6. At said time the Defendant River Hills Motel Inn Company filed a proposal to purchase parcel T-3, and the Defendant National Motor Inn Corp. filed a proposal to purchase parcel T-1.

7. On or about the 16th day of November, 1964, the Defendant City by its City Council approved the said proposals of said Defendant developers, and rejected Plaintiff's said proposal, and at said time the Defendant City and the City Council thereof ordered that the City negotiate with the said Defendant developers for contracts.

8. The proposals of the said Defendant developers do not meet the requirements of the said Urban Renewal Plan in that, among other matters, said Defendants proposed to erect motels in excess of three stories or 45 feet in height upon said parcels, in violation of Section 403.8, Code of Iowa, 1962.

9. Section 410 of the said Housing Act of 1949 as amended provides that no provision permitting the con-

struction of motels in any Urban Renewal area shall be included in any Urban Renewal Plan unless, under regulations prescribed, the City has determined that there exists in the area a need for additional units of such housing. The Defendant City has not made such a determination.

10. The Defendant City, unless enjoined, will enter into contracts with said Defendant Developers under which the City will sell said parcels to said developers and will make certain agreements to be performed in the future by the City.

11. Any action of the Defendants to sell or purchase said parcels upon the basis of the proposals of said Defendant developers and any actions or contracts by the City to implement such, and any actions to perform said contracts are illegal, inequitable, improper and void.

12. Plaintiff has no adequate, plain or speedy remedy at law. No petition for the relief prayed for herein has been previously presented to and refused by any Court or Justice.

Wherefore, Plaintiff prays that an injunction, both temporary and permanent, be issued by the Court enjoining the Defendants from entering into any contracts for the sale and purchase of said parcels T-1 and T-3, and enjoining the Defendant City from taking any steps whatsoever to implement or perform any such contracts.

2. On February 5, 1965 the Defendant, City of Des Moines and members of the City Council filed the following Answer:

"Come Now the Defendants, City of Des Moines, Iowa and Charles Iles, George Whitmer, Jens Grothe, Wallace Buss and George Nahas, members of the City Council of the City of Des Moines, Iowa, and for their separate Answer to Plaintiff's Petition state:

Division I.

1. They admit paragraph 1 of Plaintiff's Petition.

2. For answer to paragraph 2 of Plaintiff's Petition, they deny that the City of Des Moines, Iowa "purported to approve" an urban renewal plan, but admit that said City did approve the River Hills Urban Renewal Plan dated October 1, 1959, and did approve said Plan revised as of July 1, 1961 and again revised as of November 1, 1962.

3. They admit paragraph 3 of Plaintiff's Petition.

4. They deny paragraph 4 of Plaintiff's Petition.

5. For answer to paragraph 5 of Plaintiff's Petition, they do not have information sufficient upon which to form a belief as to whether or not "Plaintiff was at all times interested in purchasing parcel T-1" and therefore deny same, but admit that Plaintiff did file with the Defendant City a proposal to purchase parcel T-3.

6. They admit paragraph 6 of Plaintiff's Petition.

7. They admit paragraph 7 of Plaintiff's Petition.

8. They deny paragraph 8 of Plaintiff's Petition.

9. They deny paragraph 9 of Plaintiff's Petition, but admit that Section 410 of the Housing Act of 1959 amended Section 106 of the Housing Act of 1949 by adding at the end thereof the following new sub-section:

> "(g) No provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title shall be included in the urban renewal plan unless the community in which the project is located, under regulations prescribed by the Administrator, has caused to be made a competent independent analysis of the local supply of transient housing and as a result thereof has determined that there exists in the area a need for additional units of such housing."

10. They admit paragraph 10 of Plaintiff's Petition.

11. They deny paragraph 11 of Plaintiff's Petition.

12. They deny paragraph 12 of Plaintiff's Petition.

Wherefore, the above-named Defendants pray that Plaintiff's Petition be dismissed with costs being taxed to Plaintiff.

Division II.

1. They re-allege paragraphs 1 through 12 of Division I of this Answer as set forth above.

2. That for a further defense and as a matter in bar and estoppel, these Defendants allege and state that on or about September 15, 1964, Plaintiff, through its personal representatives appeared before a joint meeting of the City Council of the City of Des Moines, the Urban Renewal Board and the Architects' Committee and protested the proposed sale of any land in the River Hills Urban Renewal area for hotel or motel use on the general ground that if such were done it would hurt the convention hotels (including Plaintiff's hotels) in Des Moines and force them to reduce the quality and quantity of their professional staffs that serve conventions. That thereafter, and on or about November 10, 1964, Plaintiff changed its position and filed a formal written proposal with the Des Moines Urban Renewal Board for the purchase of River Hills Disposition Parcel T-3 and for its redevelopment by the erection thereon of motor hotel facilities consisting among other things of a five-story building. That on said date of November 10, 1964, the Urban Renewal Board went on record as recommending to the City Council of Des Moines, the acceptance of the proposal of the Defendant, River Hills Motor Inn Company, for the purchase and re-development of said Parcel T-3, and the acceptance of the proposal of the Defendant, National Motor Inn Corp., for the purchase and re-development

of Parcel T-1. That thereafter, and on or about November 16, 1964, the City Council of Des Moines did accept said proposals subject to concurrence of federal authorities, and directed the Urban Renewal staff to negotiate formal written contracts with said re-developers. That representatives of Plaintiff appeared before said City Council on said date and again urged the acceptance of its proposal to purchase and re-develop said Parcel T-3 in preference to accepting the proposal of the Defendant, River Hills Motor Inn Company. That Plaintiff, by its actions, conduct and statements, made in its behalf before the said City Council and the said Urban Renewal Board, intended that these Defendants could rely on Plaintiff's position that Motor Hotel units were desirable in the River Hills Urban Renewal area, and these Defendants did rely upon same and have, through the Urban Renewal staff, been conducting lengthy negotiations for the formulation of formal written contracts and minor modifications of the River Hills Urban Renewal Plan as permitted by paragraph F of said Plan and Section 403.5 (5) of the Code of Iowa 1962, all to their prejudice, and that Plaintiff ought not in equity be permitted to maintain this action at this time.

Wherefore, these Defendants pray as in Division I of this Answer.

Division III.

1. They re-allege paragraphs 1 through 12 of Division I of this Answer as set forth above.

2. That for a further defense and as a matter in bar, these Defendants allege and state that Plaintiff has been guilty of laches and unreasonable delay in bringing this action in that Plaintiff with full knowledge of the facts herein involved since at least November 10, 1964, delayed bringing this action until January 29, 1965. That Plaintiff is and has been aware of the fact that the City of Des

Moines, Iowa, has borrowed money from the federal government to purchase and acquire title to land in the River Hills Urban Renewal area, that there is still owing on said loan a considerable amount of money upon which interest is accruing day by day and that it is necessary and time is of the essence for said City to sell land in said Urban Renewal area for re-development not only to enable said City to repay said loan and avoid interest, but also to place said land back on the tax rolls so that taxes may be collected thereon. That by reason of said unreasonable delay said City has been damaged and its rights have been prejudiced in that it has entered into lengthy negotiations with the Defendants, River Hills Motor Inn Company and National Motor Inn Corp., to enter into formal written contracts, it will be forced to pay additional interest on its loan from the federal government and it will lose tax revenues as above stated.

Wherefore, these Defendants pray as in Division I of this Answer.

Division IV.

1. They re-allege paragraphs 1 through 12 of Division I of this Answer as set forth above.

2. That for a further defense and as a matter in bar, these Defendants allege and state that the relief prayed for by Plaintiff should not be granted for the reasons that Plaintiff's conduct has not been equitable and that Plaintiff does not have clean hands in that the Plaintiff has been influenced by bad motives in instituting this action; that this suit has been instituted for the accomplishment of a purpose which is injurious to the public and to the administration of the law; and that this suit has been instituted vexatiously to delay all of the rights of all Defendants herein in the continued progress and conduct of the Urban Renewal Program of the City of Des Moines, all to the damage and prejudice of these Defendants.

Wherefore, these Defendants pray as in Division I of this Answer as set forth above.

3. On February 5, 1965, Defendant River Hills Motor Inn Company and F. W. Weitz filed the following Answer:

Division I.

Come Now Defendants, River Hills Motor Inn Company and F. W. Weitz, and for their Answer state:

1. Answering the allegations of paragraph 1 of the Petition, said Defendants admit the same, and further state that the proposal for the purchase of T-3 filed with the City of Des Moines by Defendant River Hills Motor Inn Company stated that said Defendant was a partnership and that Defendant F. W. Weitz was a partner thereof, and further stated that it was contemplated that Defendant River Hills Motor Inn Company would, at a subsequent date, be formed as a limited partnership, which formation is expected to occur in the immediate future.

2. Said Defendants admit the allegations of paragraph 2 of Plaintiff's Petition.

3. Said Defendants admit the allegations of paragraph 3 of Plaintiff's Petition.

4. Answering the allegations of paragraph 4 of Plaintiff's Petition, said Defendants deny that under said Urban Renewal Plan there is presently a restriction preventing the construction of a motel in excess of three stories or 45 feet in height on Parcels T-1 and T-3, and said Defendants admit each and every further allegation of said paragraph 4.

5. Answering the allegations of paragraph 5 of Plaintiff's Petition, said Defendants deny that Plaintiff was at all times interested in purchasing Parcel T-1, and said

Defendants admit the remaining allegations of said paragraph 5.

6. Said Defendants admit the allegations of paragraph 6 of Plaintiff's Petition.

7. Said Defendants admit the allegations of paragraph 7 of Plaintiff's Petition.

8. Answering the allegations of paragraph 8 of Plaintiff's Petition, said Defendants admit that Defendant River Hills Motor Inn Company and Defendant National Motor Inn Corp. proposed to erect motels in excess of three stories or 45 feet in height on Parcels T-3 and T-1, respectively, and said Defendants deny each and every further allegation of said paragraph 8 not herein specifically admitted.

9. Answering the allegations of paragraph 9 of Plaintiff's Petition, said Defendants deny that the Defendant City has not made such a determination, and said Defendants admit the remaining allegations of said paragraph 9.

10. Said Defendants admit the allegations of paragraph 10 of Plaintiff's Petition.

11. Said Defendants deny the allegations of paragraph 11 of Plaintiff's Petition.

12. Answer the allegations of paragraph 12 of Plaintiff's Petition, said Defendants admit that no Petition for the relief prayed for in the Petition has been previously presented to and refused by any court or justice, and said Defendants deny each and every remaining allegation of said paragraph 12 not specifically admitted herein.

Wherefore, said Defendants pray that Plaintiff's Petition be dismissed at Plaintiff's cost.

Division II.

For further and separate Answer to Plaintiff's Petition, Defendants, River Hills Motor Inn Company and F. W. Weitz, allege that the Plaintiff by submitting a proposal to purchase T-3 and to erect thereon a six story motor hotel has waived and relinquished any right it may have had to:

(a) Assert any violation of any alleged restriction upon the construction of motels in excess of three stories or 45 feet in height on T-1 or T-3, or

(b) Assert any alleged failure by the City of Des Moines, Iowa, to determine that a need exists in the River Hills Urban Renewal Area for the construction of motel units.

Wherefore, said Defendants pray that Plaintiff's Petition be dismissed at Plaintiff's cost.

Division III.

For further and separate Answer to Plaintiff's Petition, Defendants, River Hills Motor Inn Company and F. W. Weitz, allege that the Plaintiff has been guilty of laches and unreasonable delay in bringing this action, in that the Plaintiff has known since November 16, 1964, or approximately eleven weeks prior to the filing of this action, of the approval by the City of Des Moines of the proposal of Defendant, River Hills Motor Inn Company, and the direction of negotiations for a formal contract by the City representative with said Defendant; that said Defendant, River Hills Motor Inn Company, has incurred substantial expenses since November 16, 1964, in the preparation of architectural plans and construction specifications, in negotiating said contract with City representatives, and in completion of the formation of a limited partnership; and that by virtue of said facts, Plaintiff is estopped from maintaining or can not maintain this action.

Wherefore, said Defendants pray that Plaintiff's Petition be dismissed at Plaintiff's cost.

Division IV.

For further and separate Answer to Plaintiff's Petition, Defendants, River Hills Motor Inn Company and F. W. Weitz, allege that Plaintiff must be denied the equitable relief prayed for in that Plaintiff's conduct has been inequitable and it does not have clean hands for the reason that the Plaintiff in instituting this litigation has been influenced by bad motives; that this suit has been instituted for the accomplishment of a purpose which is injurious to the public and to the administration of the law; and that this suit has been instituted vexatiously to delay these Defendants in the pursuit of their rights and to hamper these Defendants and the City of Des Moines in the conduct of the Urban Renewal program of such city, all to the damage of the City of Des Moines and these Defendants.

Wherefore, said Defendants pray that Plaintiff's Petition be dismissed at Plaintiff's cost.

Division V.

For further and separate Answer to Plaintiff's Petition, Defendants River Hills Motor Inn Company and F. W. Weitz, allege that Plaintiff has not pleaded the necessary allegations entitling it to a temporary injunction; that Plaintiff has not pleaded the necessary allegations entitling it to a permanent injunction; that Plaintiff has failed to state a claim on which any relief can be granted; and that by virtue of said factors Plaintiff can not maintain this action.

Wherefore, said Defendants pray that Plaintiff's Petition be dismissed at Plaintiff's cost.

4. On February 5, 1965 the Defendant, National Motor Inn Corp., filed the following Answer:

Division I.

The Defendant, National Motor Inn Corp., for its Answer states:

1. That it admits the allegations or paragraphs 1, 2 and 3 of Plaintiff's Petition.

2. For answer to paragraph 4 of Plaintiff's Petition this Defendant denies that there is presently a restriction preventing the construction of a motel in excess of three stories or 45 feet in height on Parcels T-1 and T-3, and this Defendant further denies that a motel exceeding three stories or 45 feet in height could not be properly or legally erected on said parcels. This Defendant admits the other allegations in said paragraph 4. For further answer to said paragraph 4, this Defendant asserts as a point of law that the allegations therein contained are the legal conclusions of the pleader and should be stricken.

3. For answer to paragraph 5 of Plaintiff's Petition this Defendant denies for want of information or belief the allegation that the Plaintiff was interested in purchasing Parcel T-1. This Defendant admits the remaining allegations of paragraph 5.

4. This Defendant admits paragraphs 6 and 7 of Plaintiff's Petition.

5. For answer to paragraph 8 of Plaintiff's Petition this Defendant admits that it and its co-Defendant, River Hills Motor Inn Company, proposed to erect motels in excess of three stories or 45 feet in height upon said properties but deny each and every allegation of said paragraph 8. For further answer to paragraph 8 this Defendant asserts as a point of law that the allegations therein contained are the legal conclusions of the pleader and should be stricken.

6. For answer to paragraph 9 of Plaintiff's Petition this Defendant denies that the Defendant City has not made a determination as therein alleged but admits the remaining allegations of such paragraph.

7. This Defendant admits paragraph 10 of Plaintiff's Petition.

8. This Defendant denies the allegations of paragraph 11 of Plaintiff's Petition.

9. For answer to paragraph 12 of Plaintiff's Petition this Defendant admits that no petition for the relief prayed for in the Petition has been previously presented to and refused by any court or justice. Each and every other allegation of said paragraph 12 is denied.

Wherefore, this Defendant prays that the Plaintiff's Petition be dismissed at its cost.

Division II.

For further and separate Answer to Plaintiff's Petition, Defendant, National Motor Inn Corp., alleges that the Plaintiff by submitting a proposal to purchase T-3 and to erect thereon a six story motor hotel has waived and relinquished any right it may have had to:

(a) Assert any violation of any alleged restriction upon the construction of motels in excess of three stories or 45 feet in height on T-1 or T-3, or

(b) Assert any alleged failure by the City of Des Moines, Iowa, to determine that a need exists in the River Hills Urban Renewal Area for the construction of motel units.

Wherefore, said Defendant prays that Plaintiff's Petition be dismissed at Plaintiff's cost.

Division III.

For further and separate Answer to Plaintiff's Petition, Defendant, National Motor Inn Corp., alleges that the

Plaintiff has been guilty of laches and unreasonable delay in bringing this action, in that the Plaintiff has known since November 16, 1964, or approximately eleven weeks prior to the filing of this action, of the approval by the City of Des Moines of the proposal of Defendant, National Motor Inn Corp., and the direction of negotiations for a contract by the City representative with said Defendant; that said Defendant, National Motor Inn Corp., has incurred substantial expenses since November 16, 1964, in the preparation of architectural plans and construction specifications, in negotiating said contract with City representatives, and in arranging for financing; and that by virtue of said facts, Plaintiff is estopped from maintaining or cannot maintain this action.

Wherefore, said Defendant prays that Plaintiff's Petition be dismissed at Plaintiff's cost.

Division IV.

For further and separate Answer to Plaintiff's Petition, Defendant, National Motor Inn Corp., alleges that Plaintiff must be denied the equitable relief prayed for in that Plaintiff's conduct has been inequitable and it does not have clean hands for the reason that the Plaintiff in instituting this litigation has been influenced by bad motives; that this suit has been instituted for the accomplishment of a purpose which is injurious to the public and to the administration of the law; and that this suit has been instituted vexatiously to delay this Defendant in the pursuit of its rights and to hamper this Defendant and the City of Des Moines in the conduct of the Urban Renewal program of such city, all to the damage of the City of Des Moines and this Defendant.

Wherefore, said Defendant prays that Plaintiff's Petition be dismissed at Plaintiff's cost.

Division V.

For further and separate Answer to Plaintiff's Petition, Defendant, National Motor Inn Corp., alleges as a matter of law that the Plaintiff has failed to state a claim on which any relief can be granted and has failed to state a cause of action against this Defendant.

Wherefore, said Defendant prays that Plaintiff's Petition be dismissed at Plaintiff's cost.

5. On February 18, 1965, Plaintiff filed its reply to the Answer of the City of Des Moines and members of the City Council.

**PLAINTIFF'S REPLY TO ANSWER OF THE CITY OF DES MOINES, IOWA, AND MEMBERS OF THE CITY COUNCIL,**

as follows:

Comes the Plaintiff and for Reply to the Answer of the City of Des Moines, Iowa, and members of the City Council of said city, states:

Division I.

1. Any and all affirmative allegations contained in Division I of said Answer are denied.

Division II.

1. Any and all affirmative allegations contained in Division II of said Answer are denied except Plaintiff admits that it made certain appearances before the Urban Renewal Board and the City Council, and further admits that the Urban Renewal Board purported to recommend and the City Council purported to approve the proposals of River Hills Motor Inn Company and National Motor Inn Corp.; and Plaintiff affirmatively denies that the

Urban Renewal staff was authorized or empowered to conduct negotiations.

Division III.

1. Any and all affirmative allegations contained in Division III are denied.

Division IV.

1. Any and all affirmative allegations contained in Division IV are denied.

6. On February 18, 1965, Plaintiff filed reply to answer of Defendants River Hills Motor Inn Company and F. W. Weitz as follows:

Comes the Plaintiff and for Reply to the Answer of Defendants, River Hills Motor Inn Company and F. W. Weitz, states:

Division I.

1. Any and all affirmative allegations contained in Division I of said Answer are denied.

Division II.

1. Any and all affirmative allegations contained in Division II of said Answer are denied.

Division III.

1. Any and all affirmative allegations contained in Division III are denied.

Division IV.

1. Any and all affirmative allegations contained in Division IV are denied.

Division V.

1. Any and all affirmative allegations contained in Division V are denied.

Wherefore, Plaintiff prays as in its Petition.

7. Plaintiff replied to answer of Defendant National Motor Inn Corp. on February 18, 1965, as follows:

Comes the Plaintiff and for Reply to the Answer of Defendant National Motor Inn Corp. states:

Division I.

1. Any and all affirmative allegations contained in Division I of said Answer are denied.

Division II.

1. Any and all affirmative allegations contained in Division II of said Answer are denied.

Division III.

1. Any and all affirmative allegations contained in Division III are denied.

Division IV.

1. Any and all affirmative allegations contained in Division IV are denied.

Division V.

1. Any and all affirmative allegations contained in Division V are denied.

Wherefore, Plaintiff prays as in its Petition.

8. On March 10, 1965, Defendant-Appellees River Hills Motor Inn Company and F. W. Weitz filed the following Amendment to Answer:

Come now Defendants, River Hills Motor Inn Company and F. W. Weitz, and, leave of Court having been first

obtained, hereby amend Division I of their Answer herein as follows:

1. Said Defendants strike paragraph 1 of said Division I and substitute therefor a new said paragraph 1 as follows:

1. Answering the allegations of paragraph 1 of the Petition, said Defendants deny that Plaintiff is a taxpayer and citizen of Des Moines, Iowa; admit the remaining allegations of said paragraph 1; and further state that the proposal for the purchase of T-3 filed with the City of Des Moines by Defendant River Hills Motor Inn Company stated that said Defendant was a partnership and that Defendant F. W. Weitz was a partner thereof, and further stated that it was contemplated that Defendant River Hills Motor Inn Company would, at a subsequent date, be formed as a limited partnership, which formation is expected to occur in the immediate future.

2. Said Defendants strike paragraph 4 of said Division I and substitute therefor a new said paragraph 4 as follows:

4. Said Defendants deny the allegations of paragraph 4 of Plaintiff's Petition.

Wherefore, said Defendants pray that Plaintiff's Petition be dismissed at Plaintiff's cost.

9. On March 30, 1965, Plaintiff filed the following first Amendment to Petition:

Comes the Plaintiff and amends its Petition as follows:

1. By adding paragraphs 9A and 9B as follows:

"9A. The Defendant, City of Des Moines, advertised for bids or proposals to buy on said parcel T-3 many months ago, the purchase price thereof to be not less than $3.50 per square foot as fixed by an earlier appraisal. Said City received no bids thereon at such price. Thereafter the

said City obtained a reappraisal of said parcel and, pursuant thereto, fixed a minimum purchase price of $1.85 or $1.75 per square foot and reoffered said parcel for sale to the first qualified re-developer offering to pay the minimum price as required by federal regulations. Plaintiff and another qualified re-developer offered to pay such price prior to the time such an offer was made by the Defendants River Hills Motor Inn Company and F. W. Weitz.

"9B. The Federal regulations governing bidding, binding on the Defendant City, required that if bidding is to be on any other than a cash price basis, the proposed documents themselves and the procedure specified for submission of proposals be so drawn that any qualified redeveloper 'will have a fair opportunity to submit a proposal or bid.' Section 403.8, Code of Iowa, permitted the sale of said parcels only under 'reasonable competitive bidding procedures.' The bidding procedures and documents adopted and supplied by the Defendant City did not provide Plaintiff a fair opportunity to formulate a bid and did not provide reasonable competitive bidding procedures for the reason that the City arbitrarily, illegally and improperly abandoned the bidding specifications of the said Urban Renewal Plan and, among other matters, construed said procedures and documents as permitting an eight-story motel upon parcel T-3 and a six-story motel upon Parcel T-1 and a lesser lot area per unit than required by law."

2. By adding to paragraph 7 of the Petition the following:

The Defendant City failed to comply with Section 403.8 of the Code of Iowa, 1962, which required that a notification of intention to accept a proposal be filed with the City Council not less than thirty days prior to acceptance of a proposal.

3. By adding to paragraph 8 of the Petition the following:

> Also the proposals of said developers do not meet the requirements of the said Urban Renewal Plan in that said proposals do not provide for the required lot area for each unit.

4. By adding "substantially in excess" after the words "minimum lot area" as they appear in paragraph 4 of the Petition.

Wherefore, Plaintiff prays as in its Petition.

10. On the 5th day of April, 1965, Defendants River Hills Motor Inn Company and F. W. Weitz filed the following second amendment to answer:

Come Now Defendants, River Hills Motor Inn Company and F. W. Weitz, and, leave of court having been first obtained, hereby state to the court as follows:

A. Said Defendants hereby amend Division I of their Answer as follows:

1. In answer to Plaintiff's First Amendment to Petition, paragraph 9A, Defendants admit that the City of Des Moines advertised for bids or proposals on said Parcel T-3, and further admit that the City received no qualified bids for T-3 as of August 16, 1963, and further admit that there was a re-appraisal of T-3; said Defendants deny all other allegations set forth in paragraph 9A of Plaintiff's First Amendment to Petition.

2. Defendants deny all of the allegations set forth in paragraph 9B of Plaintiff's First Amendment to Petition.

3. Defendants deny the allegations contained in the addition to paragraph 7 of Plaintiff's Petition.

4. Defendants deny the allegations contained in the addition to paragraph 8 of Plaintiff's Petition.

5. Defendants deny the allegations set forth in Plaintiff's First Amendment to Petition which adds the words "substantially in excess" after the words "minimum lot area" as they appear in paragraph 4 of the Petition.

B. Said Defendants hereby amend Division II of their Answer as follows:

1. By adding "or to assert any violation of any other alleged tourist commercial area restriction" after the words "or 45 feet in height on T-1 or T-3" as they appear in paragraph (a) of Division II of Defendants' said Answer.

Wherefore, said Defendants pray that Plaintiff's Petition be dismissed at Plaintiff's cost.

11. On April 5, 1965, the Defendant National Motor Inn Corp. filed Answer to First Amendment to Petition as follows:

Comes Now Defendant, National Motor Inn Corp., and for Answer to First Amendment to Petition denies each and every material allegation thereof not heretofore or herein expressly admitted and specifically does deny paragraph 1 of said First Amendment to Petition in which there is added to the Petition as filed, paragraph 9A and paragraph 9B, both of which are likewise denied.

12. On April 5, 1965, separate answer of City of Des Moines, Iowa, and members of the City Council of said city to first amendment to Petition was filed as follows:

Come Now the City of Des Moines, Iowa, and the members of the City Council of said City and for Answer to Plaintiff's First Amendment to Petition state:

1. With reference to paragraph 9A of said Amendment these Defendants admit that the City of Des Moines ad-

vertised for proposals to buy said parcel T-3 in May of 1963, but deny that a price was stated in said advertisements and deny that a price was fixed by an earlier appraisal. They admit that thereafter the said City obtained a re-appraisal of said parcel, but deny all other allegations in said paragraph.

With reference to paragraph 9B of said Amendment, these Defendants admit that Section 403.8 permits the sale of land under "reasonable competitive bidding procedures" but deny all other allegations contained in said paragraph.

2. They deny paragraphs 2, 3 and 4 of said Amendment.

13. On May 24, 1965, the Trial Court filed its Findings of Fact, Conclusions of Law, Summary and Direction as follows:

**Findings of Fact.**

1. The Plaintiff, Boss Hotels Company, is a corporation organized and existing under the laws of the State of Iowa with its principal place of business in Des Moines, Polk County, Iowa, and is a taxpayer. The Defendant, City of Des Moines, is a municipal corporation existing under the laws of the State of Iowa. The Defendants, Charles Iles, George Whitmer, Jens Grothe, Wallace Buss and George Nahas are members of the City Council of the Defendant City. The Defendant, River Hills Motel Inn Company, the true name of which is River Hills Motor Inn Company, is a limited partnership. The Defendant, F. W. Weitz, is a general partner in said partnership. The Defendant, National Motor Inn Corp., is a corporation authorized to do business in the State of Iowa.

2. Pursuant to the Housing Act of 1949, 63 Stat. 413, as amended, 42 USCA Section 1441 et seq., and pursuant to Chapter 403, Code of Iowa 1962, the Defendant City approved an urban renewal plan commonly referred to

as the River Hills Urban Renewal plan dated October 1, 1959, revised as of July 1, 1961, again revised as of November 1, 1962, and modified in March of 1965. Exhibits 4 and 34.

3. Pursuant to such plan the Defendant City acquired property in the River Hills Urban Renewal Area and said Defendant is now in the course of selling said property, including parcels T-1 and T-3, located therein.

4. Under the Urban Renewal Plan, Exhibit 4, and the provisions of the zoning ordinance of the City of Des Moines, Exhibit 5, said parcels T-1 and T-3 might be sold by the Defendant City to re-developers for tourist-commercial use under motel restrictions which required a minimum lot area of 750 square feet per unit, off-street parking requirements, a required floor area ratio of .5 with landscaping and sign requirements. Exhibit 4. Under said restrictions a motel not exceeding three stories or 45 feet in height could properly or legally be erected on either parcel T-1 or parcel T-3.

5. The Defendant City of Des Moines advertised for bids or proposals to buy said parcels, the purchase price thereof to be $3.50 per square foot as fixed by an appraiser. Said City received no bids thereon at such price. Thereafter the said City obtained a re-appraisal of said parcels and pursuant thereto fixed a minimum purchase price of $1.85 per square foot on T-3 and $1.75 per square foot on T-1 and re-offered said parcels.

6. Section 410 of the Housing Act of 1959 amended Section 106 of the Housing Act of 1949 by adding at the end thereof the following new sub-section:

> "(g) no provision permitting the new construction of hotels or other housing for transient use in the redevelopment of any urban renewal area under this title shall be included in the urban renewal plan unless the community in which the project is located

under regulations prescribed by the administrator has caused to be made a competent independent analysis of the local supply of transient housing, and as a result thereof, has determined that there exists in the area a need for additional units of such housing."

7. On or about September 15, 1964, Plaintiff, through its personal representatives, appeared before a joint meeting of the City Council of the City of Des Moines and the Urban Renewal Board, and protested the proposed sale of T-1 and T-3 in the River Hills Urban Renewal Area for hotel or motel use. See Exhibit 23 in this Record.

8. On or about November 10, 1964, the Plaintiff filed with the Defendant City a proposal to purchase parcel T-3.

9. At or about said time the Defendant, River Hills Motel Inn Company, filed a proposal to purchase parcel T-3, and the Defendant, National Motor Inn Corp., filed a proposal to purchase parcel T-1.

10. On the same date, November 10, 1964, Plaintiff filed its formal written proposal with the Des Moines Urban Renewal Board for the purchase of River Hills Disposition Parcel T-3 and for its redevelopment by the erection thereon of motor hotel facilities. See Exhibit 6 in this Record.

11. By their proposals the Plaintiff and the Defendant redevelopers proposed to erect structures in excess of 3 stories or 45 feet in height upon said parcels.

12. On said date, November 10, 1964, the Urban Renewal Board went on record as recommending to the City Council of Des Moines the acceptance of the proposal of the Defendant, River Hills Motor Inn Co. for the purchase and redevelopment of said parcel T-3; and the acceptance of the proposal of the Defendant, National Motor Inn Corp. for the purchase and redevelopment of Parcel T-1.

13. Thereafter representatives of Plaintiff and of said redevelopers appeared before said City Council and urged the acceptance of their respective proposals. On or about the 16th day of November, 1964, the Defendant City, by its City Council, rejected Plaintiff's proposal and accepted and approved the said proposals of said Defendant redevelopers, subject to concurrence of Federal Authorities and ordered that the City negotiate with the said redevelopers for the purpose of executing formal written contracts.

14. Plaintiff filed its Petition in this cause on January 29, 1965, at 3:57 o'clock p. m.

15. No Petition for the relief prayed for by the Plaintiff in its Petition has been previously presented to and refused by any court or justice.

16. On March 30, 1965, a pre-trial conference was held before this Court. On April 1, 1965, a transcript and order was signed and filed by this Court. The order provided that the transcript of the conference was an accurate and adequate report of the conference. It provided that exceptions and objections might be filed prior to 9:00 o'clock a. m., on April 5, 1965. None were filed. The order further provided that the report governed the further course of this action relative to the matters included unless later modified to prevent manifest injustice. Under the circumstances the Court adopts the transcript of the proceedings of the pre-trial conference as a part of these findings of fact and conclusions of law.

In connection with these findings of fact the Court especially calls attention to the following numbered paragraphs of said pre-trial conference: 141 et seq., 145 et seq., 156 et seq., 160 et seq., 163 et seq., 166 et seq., 171 et seq., 175-6 et seq., 180 et seq., 184 et seq., 188 et seq., 192 et seq., 195 et seq., 198 et seq., 210 et seq., 214 et seq.,

218 et seq., 222 et seq., 223 et seq., 234 et seq., 235 et seq., 229 et seq., and 233.

Since this matter is as complicated as it is and so that there may be no misunderstanding, the Court adopts as a part of its findings of fact all stipulations to facts entered into by the parties, whether in the pre-trial conference or at the trial, and all admissions in the pleadings agreed to by all the parties.

**Conclusions of Law.**

1. The Plaintiff has alleged in its Petition that action of the Defendants to sell or purchase said parcels T-1 and T-3 upon the basis of the proposals of said Defendant developers and any actions or contracts by the City to implement such, and any actions to perform said contracts are illegal, inequitable, improper and void. The Court concludes that the Plaintiff has failed to establish these allegations or any of them, and that on the contrary such actions on the part of the Defendants are legal, equitable, proper and valid.

2. In its amendment to Petition the Plaintiff charges that the bidding procedures and documents adopted and supplied by the Defendant City did not provide Plaintiff a fair opportunity to formulate a bid and did not provide reasonable competitive bidding procedures; that the Defendant City failed to comply with Section 403.8 of the Code of Iowa, 1962, relating to notification of intention to accept a proposal; and that the proposals of the developers do not meet the requirements of the urban renewal plan relating to required lot area. The Court concludes that the Plaintiff has not established these charges, nor any of them.

3. Various defenses have been pleaded by the Defendants, including

(a) That as a matter in bar and estoppel, Plaintiff protested the proposed sales for motel or hotel use because to do so would bring about excessive competition for the Plaintiff.

(b) That Plaintiff by filing a proposal for the purchase of parcel T-3 on the terms urged, waived its objections previously urged.

(c) That Plaintiff has been guilty of laches and unreasonable delay in bringing this action.

(d) That such delay has damaged the City.

(e) That Plaintiff's conduct has not been equitable.

(f) That Plaintiff does not have clean hands because influenced by bad motives since the suit has been instituted for the accomplishment of a purpose which is injurious to the public.

(g) That this suit has caused vexatious delay affecting the rights of all defendants and damaging and prejudicing the Defendants.

(h) That Plaintiff has not pleaded the necessary allegations to entitle it to a permanent injunction even if all allegations pleaded were proved.

(i) That Plaintiff has failed to state a claim on which any relief can be granted.

(j) That Plaintiff is without standing to maintain this suit.

Since the Court is of the opinion and has concluded that the Plaintiff has failed to establish its allegations and that on the contrary the actions on the part of the Defendants are legal, equitable, proper and valid, the Court, unless requested to do so, will not file any separate conclusions of law as to these various defenses.

4. The Plaintiff is not entitled to an injunction enjoining the Defendants from entering into contracts for the sale of said parcels T-1 and T-3.

5. Plaintiff is not entitled to an injunction enjoining the Defendant City from taking steps to implement and perform such contracts.

6. Plaintiff's Petition should be dismissed with costs to be taxed against the Plaintiff.

7. As to 3 (i) above, see the Pittsburgh Hotels Association, Inc., case decided in the United States District Court, February 14, 1962, 202 Federal Supplement 486, and the decision on the appeal of that case to the United States Court of Appeals, Third Circuit, decided October 22, 1962, 309 Fed. 2nd 186. See also 262 Federal Second 307. Although not directly applicable to this case, see also Berry against the Housing and Home Finance Agency, decided January 26, 1965, by the United States Court of Appeals, 340 Federal Second 939.

On these authorities this Court concludes that the Plaintiff in this case lacks standing to sue.

**Summary.**

There are approximately 160 pages of briefs and arguments which have been submitted to this Court for examination and study in connection with the trial of this case. The Court has examined said briefs and arguments and has studied them and believes that it would be superfluous for it to try either to add to the learned arguments or to select from them, or to refine them in some brief opinion.

Time is of the essence in this matter and the Court has always had that in mind. In its conclusions the Court has made it clear that it believes that Plaintiff has failed to make a case. On that conclusion the Court stands and

therefore directs counsel for the City of Des Moines, Iowa, in collaboration with the counsel for the other Defendants to prepare a Decree in conformity with these findings and conclusions, submit the same to counsel for Plaintiff for approval as to form and to this Court for signature.

14. On May 27, 1966, the Trial Court entered the following Decree:

**Decree.**

Be it remembered this 27th day of May, 1965, that the above matter heretofore came on for trial on the merits, the Plaintiff appearing by Bradshaw, Fowler, Proctor and Fairgrave, its attorneys, and the Defendants, City of Des Moines, Iowa, and members of the City Council of the City of Des Moines, Iowa, appearing by Don Hise, their attorney, and Defendants River Hills Motor Inn Company and F. W. Weitz appearing by Brody, Parker, Roberts, Thoma & Harris, their attorneys, and Defendant National Motor Inn Corp. appearing by Dickinson, Parker, Mannheimer and Raife, its attorneys, and the Court, having examined the pleadings and written briefs, and having listened to the testimony of witnesses, studied the stipulations of the parties and the exhibits introduced into evidence, and the case having been fully submitted, thereafter on May 24, 1965, the Court filed and entered of record herein its Findings of Fact and Conclusions of Law which are amended by changing the date appearing in paragraphs 8 and 10 of said Findings of Fact from "November 10, 1964" to "November 2, 1964", and by adding at the end of paragraph 9 of said Findings of Fact, before the period ("."), the words "on or about May 12, 1964", and as so amended are incorporated herein by reference as fully as though the same were repeated at length herein, and now, pursuant to said Findings of Fact and Conclusions of Law, and in conformity therewith, this matter comes on for final decree, and accordingly,

It Is Therefore Ordered, Adjudged and Decreed, that this cause is hereby dismissed and the costs be and they are hereby taxed against the Plaintiff.

To all of which the Plaintiff excepts.

15. On April 5, 1966, the Supreme Court of Iowa filed the following opinion:

Action to restrain the sale of urban renewal land. From a decree dismissing its petition, plaintiff appeals.—Affirmed.

Bradshaw, Fowler, Proctor & Fairgrave, of Des Moines, for appellant.

Anthony Renda and M. A. Iverson, of Des Moines, for appellees, members of the City Council and City of Des Moines, Iowa.

Harris, Thoma, Schoenthal, Davis & Hockenberg, of Des Moines, for appellees, River Hills Motor Inn Company and F. W. Weitz.

Dickinson, Parker, Mannheimer & Raife, of Des Moines, for appellee, National Motor Inn Corp.

This action of plaintiff Boss Hotels Company, herein called Boss, is to restrain defendant City and the members of its council, herein referred to as City, defendants River Hills Motor Inn Company and F. W. Weitz, herein referred to as River Hills Motor Inn, and defendant National Motor Inn Corp. from consummating sales of urban renewal land. After trial, the court dismissed plaintiff's action.

The land in question is two parcels in River Hills Urban Renewal area in Des Moines. The Urban Renewal Plan has been approved pursuant to the Housing Act of 1949, 63 Stat. 413, as amended, 42 U. S. C. A., sections 1441, et seq., and chapter 403, Code, 1962, by the Federal

Agency and the City, Local Public Agency, and its Urban Renewal Board. Under the plan and the zoning ordinance of Des Moines the two parcels, T-1 and T-3, are zoned for tourist-commercial use and might be sold for that use to redevelopers under restrictions which required a minimum lot area of 750 square feet per unit, off street parking requirements, a floor area ratio of .5, and landscaping and sign requirements. Under the restrictions the height of a motel erected on either parcel was limited to three stories or 45 feet.

In accordance with the Urban Renewal Plan the Urban Renewal Board solicited proposals to purchase parcels T-1 and T-3. Plaintiff Boss, defendant River Hills Motor Inn and the Holiday Inn people submitted proposals on parcel T-1, plaintiff Boss did not. The cut-off date on such proposals had been fixed for November 2, 1964. The proposals were on file as of such date. November 10, 1964, the Board recommended to the City Council the acceptance of the proposal of River Hills Motor Inn on parcel T-3 and of National Motor Inn on parcel T-1. On November 16, 1964, the City Council, pursuant to the recommendation, accepted the proposals of River Hills Motor Inn and National Motor Inn subject to the approval of the Federal Agency.

Briefly stated the proposals were, Boss offered $240,000 and to erect a motel varying in height from two to six stories and River Hills Motor Inn offered $236,396.70, and to erect a motel of eight stories, on parcel T-3. National Motor Inn offered the minimum cash price of parcel T-1 and to build a five story motel. Each of these proposals proposed motels of greater height than permitted under the restrictions then applicable and in each there was some variance with the area restrictions. Each proposer knew this and each had been led to believe modifications of the restrictions would be made in these particulars.

If this were not true all of the proposals were in bad faith. There is no reason to believe any of them were.

On November 16, 1964, the City amended the Urban Renewal Plan so the proposals were not at variance with the Plan or city zoning ordinance. In other words, after the proposals were in, after the cut-off date for filing proposals, and after the proposals of defendants River Hills Motor Inn and National Motor Inn had been accepted and on that date the City Council modified the Urban Renewal Plan so that the proposals conformed to the Plan.

I. Plaintiff states in its Brief and Argument, "Apppellant's case is bottomed on the proposition that under the Urban Renewal Plan, no structure on Parcels T-1 and T-3 could exceed three stories or 45 feet in height, and that the City was legally incapable of accepting bids which contemplated structures in excess of the limitation."

The trial court held plaintiff had failed to establish the allegations of its petition and plaintiff lacked standing to sue.

Plaintiff's first proposition for reversal here is "Under section 403.8 of the Code of Iowa, 1962, purchasers of urban renewal real property 'Shall be obligated to devote such real property only to the use specified in the urban renewal plan.' Therefore, the bids of Sheraton [River Hills Motor Inn] and National Motor Inn may not be accepted by the City because such bids propose structures in excess of three stories or 45 feet in height—a use not permitted by the urban renewal plan."

This proposition, on its face at least, limits the consideration of illegality to whether the change in height restrictions constitutes a change in the use.

Clearly it does not, an examination of the Loan and Capital Grant Contract for the urban renewal project be-

tween the City and the United States, the excerpts from the Urban Renewal Manual, the Urban Renewal Plan and the zoning ordinance of Des Moines, as these appear in this record, do not equate a use of the land with restrictions on the height of buildings. The documents are too long and refer to uses too many times to set out each occasion where the words are used. A few examples are, in the Urban Renewal Manual, "Chapter 2. Planning Proposals, Section 1. Land Uses and Related Proposals," is this sentence, "Regulations, controls, and restrictions in the Urban Renewal Plan must assure that acquired property will be maintained and controlled for the intended uses for the duration of the Plan." In this instance a restriction is contemplated to assure the intended use. It is not the use.

In the Urban Renewal Plan we find under, "C. Land Use Plan * * * 2. Land Use Provisions and Building Requirements. a. Permitted Land Uses: * * * b. Statement of Regulations and Controls." As you continue through the plan you find "(3) Tourist Commercial Area." Under "Uses Permitted: Motor Hotels, * * *," and under, "(a) Motor Hotel Restrictions:" we find only area restrictions. Under "(6) General Commercial Area," under "Uses:" we find a long list of permitted uses, then yard and area restrictions and then, "Maximum Height: Three stories, but not (including Chimneys) over 45 feet."

In the city ordinance under definitions "use" is not defined. The definitions of "accessory use" and "nonconforming use" do not equate use and height restriction. As we proceed through the ordinance we find, "'R-1' Residence District, 2A-8 Regulations. * * * A. Principal Permitted Uses: * * * B. Accessory Uses: * * * 2A-9 Height Regulations. * * *." The same is true as we proceed through the ordinance under each district. The uses permitted and height regulations are separately stated.

In this regard see Schueller v. Board of Adjustment of the City of Dubuque, 250 Iowa 706, 95 N. W. 2d 731; McJimsey v. City of Des Moines, 231 Iowa 693, 2 N. W. 2d 65; 101 C. J. S., Zoning, section 141, page 901, Height of buildings; and 101 C. J. S., Zoning, section 148, pages 907, 908. The use refers to the activity carried on on the premises. This is not changed by a change in the height regulation or restriction.

Plaintiff does not urge any other statute or ordinance was violated in any respect here under its first proposition. Neither the proposals of defendants River Hills Motor Inn nor National Motor Inn nor the action of the City Council in modifying the Urban Renewal Plan to allow buildings of the height proposed violate section 403.8, Code, 1962, in the respect urged.

If in fact plaintiff means to argue here the City could not legally accept the bids because they did not conform to the Plan and ordinance, plaintiff at least runs into the difficulty that its nonconforming bid was not in good faith and it could not prevail because of the clean hands doctrine. Equity refuses aid to one who had been guilty of inequitable conduct in the matter with relation to which he seeks relief. Sisson v. Janssen, 244 Iowa 123, 56 N. W. 2d 30.

Actually the record here shows plaintiff knew modifications of the Urban Renewal Plan would be made to conform to a proposal otherwise satisfactory. Plaintiff does not contend there was any fraud or collusion or that it was prevented from making a proposal on the same basis as any other developer. The proposal it made shows this.

The Urban Renewal Plan provides the council could make minor modifications and section 403.5 (5), Code, 1962, provides, "5. An urban renewal plan may be modified at any time: * * *." There follows a proviso not here

applicable. Plaintiff was aware of the provisions of the Plan and is bound to know the statute.

In this regard plaintiff urges a change in a height restriction from three to eight stories is a major, not a minor, modification. We cannot agree. It undoubtedly is a major modification in a building, but it is not a major modification in an urban renewal plan. The plan remains intact, the use of the particular tract remains the same, only the height of the building permitted is modified. An authority squarely in point has not come to our attention, but as having some bearing, see Pittsburgh Hotels Association, Inc. v. The Urban Redevelopment Authority of Pittsburgh, 309 F. 2d 186, 190-191.

II. The second proposition urged by plaintiff here is that the proposed sales of parcels T-1 and T-3 were for less than their fair value, thus violating section 403.8, Code, 1962, in part as follows, "Such real property * * * shall be sold * * * at no less than its fair value for uses in accordance with the urban renewal plan." We do not find this proposition was pleaded below. Defendants so urge and plaintiff in reply does not challenge them. It is not properly before us. We are limited by the record made in the trial court. Nelson v. Leaders, ... Iowa ..., ... N. W. 2d ... (No. 51,930, filed March 8, 1966); Best v. Yerkes, 247 Iowa 800, 811, 77 N. W. 2d 23; and Stolar v. Turner, 237 Iowa 593, 606, 21 N. W. 2d 544.

We may say, however, under the bidding procedures adopted by the City Council pursuant to the Urban Renewal Plan allowing for considerations other than price, where, as here, the proposals accepted were substantially if not actually the appraisal price, the determination by the City Council that the proposed price was not less than the fair value has substantial support and should not be disturbed by us on the showing made by plaintiff. Plaintiff's chief executive officer did testify, that if he had any

idea he could have put an eight or ten story building on T-3 he would have raised his bid up, "* * * say possibly as much as $15,000.00 because we could save twice that."

III. We do not reach the question of plaintiff's standing to sue.

Under the record made plaintiff has not shown it is entitled to the intervention of a court of equity. We think the record shows plaintiff knew, as the others making proposals knew, the Council would act to modify the Urban Renewal Plan in respect to height restrictions. Its proposal is evidence of this. The stated policy of urban renewal legislation to expeditiously return blighted areas to productive use should not be thwarted under this record.—Affirmed.

All Justices concur.

SUPREME COURT, U. S.
FILED
SEP 6 1966

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

## No. 431

BOSS HOTELS COMPANY,
*Petitioner,*

vs.

CITY OF DES MOINES, IOWA, CHARLES ILES, GEORGE WHITMER, JENS GROTHE, WALLACE BUSS, GEORGE NAHAS, Members of the City Council of the City of Des Moines, Iowa, RIVER HILLS MOTOR INN COMPANY, F. W. WEITZ and NATIONAL MOTOR INN CORP.,
*Respondents.*

## RESPONDENTS' BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI AND RESPONDENT CITY OF DES MOINES' REQUEST FOR DAMAGES FOR DELAY

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*Respondents.*

## RESPONDENTS' BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI AND RESPONDENT CITY OF DES MOINES' REQUEST FOR DAMAGES FOR DELAY

Respondents pray that this United States Supreme Court not issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Iowa entered in the above entitled case on April 15, 1966.

## JURISDICTION

Petitioner's statement of grounds of jurisdiction on page 2 of the Petition for Writ of Certiorari refers to the Act of June 25, 1948, Chapter 646, §1, 62 Stat. 927. Petitioner's counsel has informed respondents that petitioner was referring rather to 62 Stat. 929. Petitioner's statement of the jurisdiction is in error because the state court judgment rests only upon interpretation of an Iowa Statute. The validity of a treaty or statute of the United States was not drawn in question, nor was the validity of a State statute drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, nor was any title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

## STATUTES, ORDINANCES AND REGULATIONS

The statutes, ordinances and regulations which the case involves and which petitioner has omitted are as follows:

1. Section 403.5(5) Code of Iowa, 1962, provides:

> "An urban renewal plan may be modified at any time: Provided, that if modified after the lease or sale by the municipality of real property in the urban renewal project area, such modification may be conditioned upon such approval of the owner, lessee or successor in interest as the municipality may deem advisable, and in any event such modification shall be subject to such rights at law or in equity as a lessee or purchaser, or his successor or successors in interest, may be entitled to assert."

2. Rule 56 (4) of the Supreme Court Rules states:

> "Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

3. Paragraph F of the Urban Renewal Plan of the City of Des Moines, Iowa, provides:

> *"Change in the Approved Plan.*
>
> All major or significant amendments in the Urban Renewal Plan after initial passage by the City Council of Des Moines, will be subject to the same requirements and procedures by which this plan was initially adopted. The right to make minor modifications in said plan is reserved in the City of Des Moines, and such minor modifications will not be subject to the same requirements and procedures by which this plan was initially adopted." *Urban Renewal Plan of Des Moines, Urban Renewal Project No. 1, City of Des Moines, Iowa, p. 14.* (R 223)

## QUESTIONS PRESENTED

1. Where (a) questions of interpretation of a Federal regulation and of a contract between a City and the Federal government are not presented to a State Court in any manner, (b) a state statute is the only item presented for interpretation to the State Court and the decision of the State Court is only on that statute, (c) reference to the Federal regulations and the Federal contract in the State Court decision is for the sole purpose of ascribing by parallel a precise meaning to the word "use" as it appears in state statutes, and (d) no other matters conferring jurisdiction under the Act of June 25, 1948, Chapter 646, §1, 62 Stat. 929, are presented to

the State Court, does the United States Supreme Court have jurisdiction to review?

2. Was the Iowa Court's decision, which was in substance that the word "use" as used in the Iowa statute referred to the actual use of the property in contradistinction to zoning height requirements, a federal question of substance such as to merit the attention of this Court?

3. Is a change in height restriction on Urban Renewal Property a change in "use," and, if so, does that change prevent sale of said property after concurrence of the Housing and Home Finance Agency of the United States in that sale?

4. Has a prospective redeveloper of Urban Renewal land itself proposing to build a structure in excess of three stories in height waived any right to complain of the award of said land to other redevelopers on the ground that those successful redevelopers proposed structures in excess of three stories in height, and is the unsuccessful redeveloper estopped from urging that said sale be prevented?

5. Does a dissatified competitor have a justiciable right to question the award of Urban Renewal land to others?

6. Does a dissatisfied competitor have standing to question the award of Urban Renewal land to others?

7. Is the respondent City of Des Moines, Iowa, entitled to damages for delay under Rule 56.4 of the Supreme Court Rules?

Petitioner in the last paragraph of Part C, page 3 of its Petition to this Court misstates the record in the case. The record is uncontradicted that petitioner itself had submitted a proposal on parcel T-3 for a motor hotel

varying in height from two to six stories while complaining of proposals of five and eight stories in height respectively by respondents, National Motor Inn Corp., hereinafter noted as "Downtowner," and River Hills Motor Inn Company, hereinafter noted as "Sheraton." Petitioner does properly set out the heighth of its proposed structure on page 8, paragraph 3 of its Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

Respondents add to petitioner's Statement of the Case, the following:

Petitioner has a financial interest in and is the operator of two major hotels—The Hotel Fort Des Moines and Hotel Savery in downtown Des Moines—a few blocks from the urban renewal parcels in question. (R 60) Section 403.5(5) of the Code of Iowa, 1962, and the Urban Renewal Plan of the City of Des Moines, paragraph F, allowed modifications to be made in said Urban Renewal Plan at any time. The requirements and procedures for the initial adoption of the Urban Renewal Plan were inapplicable to minor modifications in said plan. The proposals of respondents "Sheraton" and "Downtowner" including structures of over the three story C-2 zoning height limitation then made applicable to the Urban Renewal Plan, were accepted subject to concurrence of the Housing and Home Finance Agency of the United States, hereinafter known as "H.H.F.A." (R 317) On the date of said conditional acceptance of respondents' "Sheraton" and "Downtowner" proposals, the City Council of the City of Des Moines adopted a minor modification to the Urban Renewal Plan, as revised, amended and modified, by removing the height restriction on T-1 and T-3. (R 318-319) Since that time, the H.H.F.A.

has concurred in the sale of said property to respondents "Sheraton". and "Downtowner."

Petitioner here also proposed a structure in excess of three stories on parcel T-3, but did not submit a proposal on parcel T-1.

Petitioner urges at page 11 of its petition that an allegation in its original petition stating that the proposals of respondents "Sheraton" and "Downtowner," did not comply with Section 403.8, Code of Iowa, 1962, raised the question as to whether the proposed sale met the Federal requirement of adherence to the Urban Renewal Plan. Respondents add that in no way did petitioner raise in the State Court the question which it here urges upon this Court. Plaintiff's original petition did allege violation of a federal statute but said allegation was voluntarily withdrawn by plaintiff in the pretrial conference. (R 75)

One element in this case relates solely to the filing of the petition for writ of certiorari where there appears to be no ground for granting the writ (Rule 56.4 of the Supreme Court rules). By stipulation in the record (R 68-69) it was agreed that the interest cost to the River Hills Urban Renewal Project in the City of Des Moines, Iowa, on money borrowed to finance such project is $26.71 per day as to parcel T-3 and $22.35 per day as to parcel T-1. The pertinency of such loss as it related to delay in consummating the subject sales as a result of this litigation is conceded by the stipulation. (R 68)

This Court does therefore have both the proper situation and the proper record to adjudge to the respondent, City of Des Moines, Iowa (the obligor of the subject moneys as the local public agency) damages equal to the said interest cost for the period of time from May 11,

1966 (the date of denial of rehearing in the Iowa Supreme Court, Page 11 of Petition) to date of denial of the writ or any subsequent denial of petition for rehearing thereon.

## REASONS FOR NOT GRANTING THE WRIT

### I.

### The Judgment of the Iowa Supreme Court Rests upon a Non-Federal Ground.

The judgment of the Iowa Supreme Court rests solely upon a non-federal ground. No Federal questions as would give this Court jurisdiction under 62 Stat. 929 were presented to the Iowa Court. The Iowa Court stated in Division I of its opinion:

> "Plaintiff's first proposition for reversal here is 'Under section 403.8 of the Code of Iowa, 1962, purchasers of urban renewal real property "Shall be obligated to devote such real property only to the use specified in the urban renewal plan." Therefore, the bids of Sheraton [River Hills Motor Inn] and National Motor Inn may not be accepted by the City because such bids propose structures in excess of three stories or 45 feet in height—a use not permitted by the urban renewal plan.'"

The Iowa Court then determined that a change in height restrictions was not a change in use and that the provisions of Section 403.8 of the Code of Iowa, 1962, had been satisfied. The Court, in arriving at this determination, examined case law, the loan and grant contract between the City and the United States, the Urban Renewal Manual, the Urban Renewal Plan, and the Zoning Ordinance of the City of Des Moines. The Court then stated, in Division I:

> "Plaintiff does not urge any other statute or ordinance was violated in any respect here under its first proposition. Neither the proposals of defendants River

> Hills Motor Inn nor National Motor Inn nor the action of the City Council in modifying the Urban Renewal Plan to allow buildings of the height proposed violate section 403.8, Code, 1962, in the respect urged."

The Iowa Court in Division II discussed the second and last proposition urged to it by Boss Hotels Company, petitioner, now before this Court. The Iowa Court stated:

> "II. The second proposition urged by plaintiff here is that the proposed sales of parcels T-1 and T-3 were for less than their fair value, thus violating section 403.8, Code, 1962, in part as follows, 'Such real property * * * shall be sold * * * at no less than its fair value for uses in accordance with the urban renewal plan.' We do not find this proposition was pleaded below. Defendants so urge and plaintiff in reply does not challenge them. It is not properly before us."

Petitioner did not in the Court below draw the validity of a treaty or statute of the United States in question, or draw the validity of a state statute in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, nor was any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States.

Petitioner submits to this Court that by urging noncompliance with Section 403.8 of the Code of Iowa, 1962, to the Iowa Court, it also impliedly raised the question as to whether the proposed sales satisfied any existing Federal requirements of adherence to the Urban Renewal Plan. Respondents here urge that the question as to whether the proposed sales met the Federal requirement of adherence to the Urban Renewal Plan, if there was such requirement, was not raised in any manner before the Iowa Court. This Court has always required that a question be raised before

the State Court before raising it here. This Court in the case of *Whitney* v. *California,* 274 U.S. 357, 47 S.Ct. 641, 71 L. Ed. 1095 (1926), cited with approval a number of earlier cases stating as follows:

> "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. * * * and this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here,—not presented in or passed upon by the Court of Appeal . . ." 274 at 362.

## II

### The Question Here Raised by Petitioner Is Not a Federal Question of Substance.

The proposition petitioner here raised for the first time is a narrow one, (a) that a change in height restrictions on two urban renewal parcels designated for motor hotels which allowed motor hotels of a height in excess of the original height restriction to be erected on those parcels is a change in "use"; (b) that such a change in "use" breaches the contract between respondent City and the Federal government and fails to satisfy the alleged requirements of the Urban Renewal Manual that the land sold be devoted to the "uses" specified in the Urban Renewal Plan without modification.

Petitioner ignores the fact that the Iowa Statute, the Urban Renewal Plan of the City of Des Moines, Iowa, and the Federal regulations all allow the modification of the Urban Renewal Plan.

Petitioner cited no cases to the Iowa Supreme Court holding that a change in the height was a change in "use," thereby being in violation of Section 403.8 of the Code of Iowa, 1962. Neither has petitioner cited in its petition

to this Court a case which holds that a change in height is a change in "use." Petitioner does not explain why its question here raised should be of concern to this Court. Even (a) if petitioner could overcome its failure to urge violation of the Federal regulations and breach of the Federal contract to the Iowa Court, (b) if petitioner could overcome respondent's equitable defenses stemming in part from petitioner's submission of a proposal also higher than that the Urban Renewal Plan allowed unless modified, and (c) if petitioner could overcome all defenses of respondent, then it is respectfully submitted that petitioner has yet failed to submit any Federal questions of substance.

III.

**The Decision Below Is Clearly Correct.**

Petitioner has cited no cases in this matter holding that a change in height is a change in "use" and that such was then a violation of the Federal regulations, and a breach of respondent city's contract with the Federal government. The only cases cited in this matter uniformly hold a change in height is not a change in "use." See *Schueller* v. *Board of Adjustment*, 250 Iowa 706, 95 N.W.2d 731 (1959); *McJimsey* v. *Des Moines*, 231 Iowa 693, 2 N.W.2d 65 (1942).

Petitioner has cited no cases holding that which petitioner here urges. The uses of the Urban Renewal Plan remained the same before and after the modification which allowed a higher motor hotel to be constructed. The use, as stated in the original Urban Renewal Plan, at all times was "tourist commercial." (R 213, 215) This use, as was determined by the Iowa Supreme Court, remained constant. The Iowa Supreme Court found, in Division I of its opinion:

"The use refers to the activity carried on on the premises. This is not changed by a change in the height regulation or restriction."

Even if the word "uses" as used in the Urban Renewal Manual and the contract between the City and the Federal government is equated to "height restrictions" the acceptance of the City of respondents' "Downtowner's" and "Sheraton's" proposals was conditioned upon the H.H.F.A.'s concurrence (R 317) and said concurrence could not be given until the proposal satisfied the Urban Renewal Plan. (R 366) The plan was properly modified by the respondent City under its Urban Renewal powers as expressed in Section 403.5(5) of the Code of Iowa, 1962, and paragraph F of the Urban Renewal Plan (R 223) by which the city had the power to make minor modifications in the Urban Renewal Plan. This modification was made before the H.H.F.A. concurrence which satisfied the condition of the city's acceptance. Respondents' proposals met the plan in all respects at that time, and hence, the requirements of the Urban Renewal Manual and the contract between the City and the Federal government were satisfied.

Further, petitioner by submitting a proposal for a motor hotel in excess of three stories, had waived its rights and was estopped from complaining that the award to respondents "Sheraton" and "Downtowner" was improper because respondents' proposals were in excess of three stories. See *Callanan Road Improvement Co.* v. *U. S.*, 345 U.S. 507, 97 L. Ed. 1206 (1952); *Clifton Land Company* v. *City of Des Moines*, 144 Iowa 625, 123 N.W. 340 (1909).

Additionally it is submitted that respondent as a disappointed competitor in this matter had no standing to sue in this matter, See *Pittsburgh Hotels Association* v.

*The Urban Redevelopment Authority of Pittsburgh, et. al.*, 202 F. Supp. 486, Aff'd 309 F.2d 186, Cert. den. 372 U.S. 916, 83 S. Ct. 730 (1962); *Taft Hotel Corporation* v. *Housing and Home Finance Agency,* 162 F. Supp. 538, Aff'd 262 F.2d 307 (1958), nor did petitioner have a justiciable right. *Rugo, Inc.* v. *Henson,* 148 Conn. 430, 171 A.2d 409 (1961).

## DAMAGES

The supposed ground for granting the Writ in this cause set forth by the petitioner is so insubstantial that its purpose becomes apparent: The Petitioner is seeking a delay in the disposal of Urban Renewal land for purposes which would compete with its present hotel operations in Des Moines, Iowa. The respondent, City of Des Moines, in its capacity as the local public agency, is suffering damages at a daily rate of $49.06 in interest cost alone by reason of this delay. The record has no monetary figure on the real estate tax loss occasioned by this delay. The petition is frivolous. This case involves the power of the City of Des Moines to modify local ordinances to change a building height restriction. Any question that inheres therein is not a substantial Federal question. Moreover, petitioner did not even submit a proposal on parcel T-1 but nevertheless by filing its petition delayed its disposal. It is respectfully submitted the Court has before it a record on which it can base a judgment in favor of the respondent City of Des Moines, Iowa, for reasonable damages as Rule 56 (4) permits.

## CONCLUSION

Petitioner for the first time in this case contends that the determination of whether a change in "height" is a change in "use" is a substantial Federal question.

This petition should be denied for the reasons hereinbefore set forth in this Brief that (a) the judgment of the Iowa Supreme Court rests upon a non-Federal ground, (b) the issue raised by petitioner is not a Federal question of substance, and (c) the decision of the Iowa Supreme Court is clearly correct.

Respectfully submitted,

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## SUPPLEMENT TO CONCLUSION UNDER RULE 56.4 OF THE SUPREME COURT RULES

The respondent City of Des Moines, Iowa hereby respectfully prays this Court to adjudge damages against the petitioner in the sum of $49.06 per day for each day of the period commencing May 11, 1966 and ending on the date of denial of the Petition for Writ of Certiorari, or the date of denial of any subsequent petition for rehearing of such denial, whichever is later, all as provided by Rule 56.4 of the Supreme Court Rules.

Respectfully submitted,

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IN THE

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No. 431

BOSS HOTELS COMPANY,
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Respondents.

## BRIEF

Of Petitioner Opposing Motion for Damages.

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Respondents.

## BRIEF

**Of Petitioner Opposing Motion for Damages.**

Your Petitioner, Boss Hotels Company, shows the Court:

The Respondent, City of Des Moines, Iowa, prays for damages in the amount of $49.06 per day commencing May 11, 1966. The City apparently claims $26.71 per day as to Parcel T-3 and $22.35 per day as to Parcel T-1, a total of $49.06 per day. The City evidently takes the position that the City would have completed the sales of Parcels T-1 and T-3, obtained the purchase prices there-

for and applied such on the loan from the Federal Government if Boss Hotels had not sought a Writ of Certiorari.

If it is assumed that United States Supreme Court finds that the Petition for Writ of Certiorari was without foundation, damages should neyertheless be denied the City for the following reasons:

1. Attached hereto as Appendix "A" is the Decree of the Polk County, Iowa, District Court in Equity Cause 70,472 dated and entered March 25, 1966. The United States Supreme Court will observe that the City of Des Moines and the other Defendants in said cause are permanently enjoined from entering into any contract for the sale of Parcel T-3 to River Hills Motor Inn Company. The City of Des Moines and River Hills Motor Inn Company have appealed such decision to the Iowa Supreme Court where the case is now pending. **It is evident that the City, because of such injunction could not have completed the sale of Parcel T-3 to River Hills Motor Inn Company and could not have applied the purchase price thereof toward any interest owing by the City to the Federal Government.** The City is practicing a deception on the United States Supreme Court. The City well knew when it made its claim for damages that the injunction was in full force and effect and that the City could not have suffered any damages by reason of the action of Boss Hotels.

2. At no time did Boss Hotels obtain either a temporary or permanent injunction against the City or any of the Respondents. Therefore, so far as Boss Hotels is concerned the City could have completed the sales of Parcels T-1 and T-3. In other words, Boss Hotels did not hold up completion of the sales by the City. Hence the City suffered no damage.

3. The claim for damages assumes without justification, firstly, that River Hills and Motor Inn Corp. would have

completed the sales and paid the purchase prices, and secondly, that if the City had received the purchase price it would have somehow during the period after May 11, 1966, repaid the loan obtained from the Federal Government. These are wholly unwarranted assumptions, and to award damages would be based on mere speculation.

Wherefore, Petitioner prays that damages be denied.

H. M. COGGESHALL,
11th Floor,
Des Moines Building,
Des Moines, Iowa,
Attorney for Petitioner.

## APPENDIX "A".

In the District Court of the State of Iowa,
in and for Polk County.

| | |
|---|---|
| Inn Operations, Inc., Plaintiff, vs. River Hills Motor Inn Company, a Partnership, and F. W. Weitz, Individually and as a Member of Said Partnership; City of Des Moines, Iowa; Charles Iles, George Whitmer, Jens Grothe, Wallace Buss and George Nahas, Individually and as Members of the City Council of Des Moines, Iowa, and as Members of the Urban Renewal Board of Des Moines, Iowa, Defendants. | Equity. No. 70,472. |

Decree.

And Now, to-wit, on this 25th day of March, 1966, the above matter having heretofore come on for trial upon the merits, the Plaintiff appearing and represented by its attorneys, Connolly, O'Malley and Conley, of Des Moines, Iowa, and the Defendants, River Hills Motor Inn Company, a partnership, and F. W. Weitz, individually and as a member of said partnership, appearing by their attorneys, Brody, Parker, Roberts, Thoma and Harris, now known as Harris, Thoma, Schoenthal, Davis and Hockenberg, Des Moines, Iowa, and the Defendants, City of Des Moines, Iowa, and Charles Iles, George Whitmer, Jens Grothe, Wallace Buss and George Nahas, individually and as members of the City Council of Des Moines, Iowa, appearing by their attorney, M. A. Iverson, of Des Moines,

Iowa, and the Court, having examined the pleadings and written briefs and having heard the testimony of the witnesses, studied the stipulations of the parties and exhibits entered into evidence, and the case having been fully submitted, thereafter on the 15th day of March, 1966, the Court filed and entered of record herein its Findings of Fact and Conclusion of Law, which were amended on the 16th day of March, 1966 by withdrawing numbered Paragraph 1 of the Conclusion of Law filed March 15, 1966 and inserting in lieu thereof Paragraph 1 as set forth in the Amendment of March 16, 1966, and which are here amended as follows: 1. By striking the year "1965" in line 10 of Paragraph 2 of the Findings of Fact and substituting in place thereof the year "1964"; 2. By adding after the words "complied therewith" in the last line of Paragraph 7 of the Findings of Fact the words, "except in the matter of floor area ratio, said floor area ratio of Plaintiff being 0.53"; 3. By striking the word "eliminating" in line 5 of Paragraph 9 of the Findings of Fact and substituting in lieu thereof the following words: "ratifying the November 16, 1964 elimination of", and said Findings of Fact and Conclusion of Law as so amended are incorporated herein by reference as fully as though the same were repeated at length herein, and now, pursuant to said Findings of Fact and Conclusion of Law, and in conformity therewith this matter comes on for final Decree and accordingly,

It Is, Therefore, Ordered, Adjudged and Decreed as follows, to-wit:

1. That a permanent injunction be and the same is hereby issued enjoining the Defendants and each of them from entering into any contracts for the sale and disposal of Parcel T-3 to River Hills Motor Inn Company, a partnership, or anyone claiming by or through River Hills Motor Inn Company pursuant to the proposal of River

Hills Motor Inn Company submitted November 2, 1964, and approved by the Defendant City of Des Moines, Iowa, November 16, 1964, and the contracts, if any, entered into pursuant thereto are illegal, void and contrary to law.

That the Defendant, City of Des Moines, Iowa, is not enjoined from reoffering Parcel T-3 for sale to the general public, including the parties to this litigation, under new proposals or bids which comply with the statutes and laws governing sale and disposal of urban renewal property.

2. That the costs of this action are taxed against the Defendants.

3. To all of the above the Defendants except.

/S/ Harry Perkins, Jr.,
Harry Perkins, Jr.,
Judge of the Ninth Judicial
District of Iowa.

Filed Polk County, Iowa,
March 25, 1966, 8:34 A. M.,
Michael H. Doyle, Jr.,
Clerk District Court,

Book 313, Pages 577, 578, 579.

The Foregoing Decree Approved as to Form Only:

Harris, Thoma, Schoenthal, Davis & Hockenberg,
By /S/ Donald A. Wine,
Attorneys for Defendants, River Hills Motor Inn Company, a Partnership, and F. W. Weitz, Individually, and as a Member of Said Partnership.

City of Des Moines, Iowa,
By /S/ M. A. Iverson.

Approved as to form and content.
Connolly, O'Malley & Conley, (Signed)
Attorneys for Plaintiff.